THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Ken-25-169, SRP-25-190

STATE OF MAINE
Appellee

v.

PETER CAYOUETTE
Appellant

ON APPEAL from the Kennebec County Unified Criminal Docket

APPELLANT'S REPLY BRIEF

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First Assignment of Error

The trial court erred by imposing no sanction for the State's conceded discovery violation, resulting in the admission of "significant" evidence for the State.

I. Justice Lipez's ruling was correct.

A.K.'s unsealed Snapchat message with C[redacted] appears in its entirety in this Court's public file.[1] The Snapchat message is the only evidence the State had of A.K. describing abuse by defendant during the period alleged in the indictment. But the message also alludes more generally to A.K.'s sexual history with other people. At the time she created the message, A.K. was twelve years old. Undersigned counsel previously attempted to tread lightly. *See* Blue Br. at 23 n. 7.

C[redacted] commented that A.K. was "inappropriate" and "gross," and chastised that although A.K. "should totally know about sex…it's just no[t] like socially correct to just say stuff like that all the time."

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[1] The message appears in the record, in full, in two places: as Defense Exhibit 1 to Defendant's Motion for Discovery Sanctions, and as an attachment to the State's Motion in Limine Regarding Snapchat Messages From the Victim in 2018.

Defendant requested a continuance to find C[redacted] and "try to understand what might have been going on." (A: 25). Further investigation was necessary because: "I don't know what was sexually inappropriate that [A.K.] was doing, but somebody is admonishing her for engaging in sexually inappropriate behavior. That could be very relevant." (A: 24). Defense counsel recalled a case where the victim made "comments about how she had just slept with somebody the day after the supposed rape happened. If you are a juror, that might be relevant to the issue of whether or not you were actually raped." (A: 24).

Justice Lipez ruled: "To the extent that the defense wanted to investigate whether [A.K.] was engaging in any sexually inappropriate behavior" with people other than defendant, "any evidence of sexually inappropriate behavior on the part of [A.K.] would not be admissible anyway under Rule 412." (A: 25; M.R. Evid. 412 (titled, "Sex-Offense cases: The victim's sexual behavior or predisposition")). *On this basis*, Justice Lipez denied defendant's motion for a continuance. (A: 25).[2]

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[2] It is imprecise to say that Justice Lipez denied a continuance because "further investigation would be unlikely to uncover anything helpful to the defense." (Red Br. 15). Justice Lipez ruled that further investigation would not uncover "anything exculpatory" because it would not uncover anything *admissible* for the defense. (A: 25)

Justice Lipez's decision to sanction the State was correct. Discovery rules effectuate the due process concerns of "aiding effective trial preparation," developing "a full account of the relevant facts," helping to "detect and expose attempts to falsify evidence," and preventing "factors such as surprise from influencing the outcome at the expense of the merits of the case." *Taylor v. Illinois*, 484 U.S 400, 425 (1988) (Brennan, J., dissenting).[3] If discovery violations are allowed to occur with impunity, then the fundamental fairness concerns that they are designed to ensure are utterly compromised, as is any resulting trial verdict. The State rightly agreed that a sanction was appropriate. (A: 22-24).

Justice Lipez's ruling about Rule 412 was correct, as well. Obviously, the State never argues otherwise. But Justice Mitchell decided that further investigation by the defense was possible – the obvious implication being that such an investigation could have uncovered legally admissible evidence. (A: 23). Justice Mitchell was wrong about that, and he was wrong to overrule Justice Lipez and impose no sanction whatsoever.

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[3] Citing to nothing, the State says that "the central purpose of discovery sanctions is to eliminate unfair surprise…". (Red Br. 14). Avoiding surprise is only one of the reasons for discovery rules.

II. The State's arguments are largely nonresponsive.

One, even assuming *arguendo* that evidence about A.K.'s sexual history would have been admissible, the State makes to attempt to defend Justice Mitchell's idea that the defense could have located C[redacted]. C[redacted] is the older sister of A.K.'s friend from sixth grade (at the time of trial, A.K. was in college); according to the State, either C[redacted] or A.K.'s friend (the record is unclear) "moved out of State at some point" and A.K. and these people "are no longer in contact in any way." (First Trial Tr. 10-11; 1Tr. 28-29, 140; A: 23). The State offers no suggestion as to how C[redacted] could be found.[4] The State does not know C[redacted]'s last name. (A: 23). Any argument by the State in support of Justice Mitchell's wholly speculative ruling that if the defense really tried, it could find C[redacted], is forfeited. *See State v. Salisbury*, 2017 ME 215, ¶ 2, 173 A.3d 146 (forfeiture on appeal occurs when a party fails to offer any legal argument with citation to proper authority). Justice Mitchell's erroneous belief about the feasibility of locating C[redacted] is justification alone for reversal.

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[4] At the first trial, the court asked the prosecution: "So you don't have any idea where this C[redacted] is?" The prosecutor replied: "I don't have any idea. I don't know if she would be hard to find or not." (First Trial Tr. 11).

Two, the eleven-month interregnum between the first and second trials did not give the defense the continuance it asked for. (Red Br. 16). Again, such an argument overlooks Justice Lipez's ruling. The defense could have investigated endlessly, but it would not have mattered because the fruits of that investigation would have been inadmissible.

Three, the State properly suffered a "very significant sanction" when Justice Lipez excluded the Snapchat message during the first trial. But defendant was convicted after the second trial, and for purposes of that trial, the State suffered no sanction at all. At the second trial, Justice Mitchell admitted a heavily sanitized version the Snapchat message which removed any portion of the message that could have generated impeachment material and omitted any reference to A.K.'s "gross" and "inappropriate" behavior.

In fact, instead of suffering a penalty for its rule-breaking, the State benefited – mightily – from the admission of Snapchat evidence.[5] Key

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[5] As Justice Lipez rightly acknowledged, it does not matter that "[t]he State informed defense counsel within two hours of becoming aware of the information, acknowledged the discovery violation to the court…." (Red Br. 9). A prosecutor has a duty to learn of any favorable evidence known to those acting on the State's behalf, including the police. *See e.g. Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam).

evidence that it withheld was admitted at trial.[6] The State conceded that the Snapchat evidence was "an incredibly significant issue in this case." (A: 28). The State bolstered A.K.'s credibility with the Snapchat message on *many* separate occasions in its summation because it was the only statement about abuse that A.K. made during the time alleged in the indictment.[7] (Blue Br. 30 (collecting record citations)). The first question that the jurors asked was about the Snapchat message. (A: 87).[8] At the first trial, the evidence was excluded. At the second trial, the evidence was admitted, and defendant was convicted. The State cannot prove that admission of the Snapchat evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

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[6] A.K. told C[redacted], "I nearly get raped every night except when I'm on my period[.]". (1Tr. 132; State's Exhibit 3).

[7] All of A.K.'s other statements were made long after the alleged abuse ended. *See* Red Br. 17-18. The CAC interview happened in 2020 (1Tr. 87); the Snapchat message with two of A.K.'s friends happened in 2020 (2Tr. 46-47, 53); A.K.'s text message to her mother happened in 2020 (2Tr. 15, 41); A.K.'s statements to law enforcement happened from 2020 through 2024. The State presented no evidence about the controversial concept of delayed reporting.

[8] *State v. Dobbins*, 2019 ME 116, 215 A.3d 769, has nothing whatsoever to do with either the facts or legal issues presented here, and is of no moment. *See* Red Br. 17.

Four, the State says that "the defendant had almost a year to prepare for trial knowing the Snapchat message existed and that the State intended to offer [it] at trial." (Red Br. 14). Not so. The first trial ended on February 27, 2024. The second trial began on January 29, 2025. The State waited until January 9, 2025, before it sought the admission of A.K.'s Snapchat message with C[redacted]. Justice Mitchell's willingness to overrule Justice Lipez was not revealed until the morning of the second trial, and that absolutely came as a shock to the defense.

Five, nothing about the "circumstances" of the case changed between the first and second trial. (Red Br. 14). There was no intervening change in the law or modification to Rule 412 which would have nullified the legal basis for Justice Lipez's ruling. Again, the State makes no argument that Justice Lipez's ruling was wrong.

Six, the State argues that Justice Mitchell's ruling "focused the trial on the merits of the case rather than on the State's discovery violation," and that at any rate, "courts are not required to issue sanctions on every discovery violation which occurs." (Red Br. 14-15). But the "merits" of the case cannot possibly refer to the State's evidence, because a "significant" component of the State's evidence was tainted by its

discovery violation. By operation of the Due Process Clause, courts *are* required to promote fairness, and if a court is unwilling to impose any sanction at all when a "significant" piece of evidence is withheld without justification, then discovery rules, and the fairness they promote, have no utility at all. There is no fairness.

Justice Mitchell denied defendant his constitutional right to a fundamentally fair trial. The remedy is to remand the case for further proceedings, which may include a new trial.

Second Assignment of Error

Several of the trial court's aggravating sentencing factors offend the Fifth, Sixth and Fourteenth Amendments to the federal constitution.

I. The unconstitutional conditions doctrine is the controlling decisional law.

The State says that sentencing judges have "broad discretion in determining what information to consider at sentencing," and "are only limited by 'the due process requirement that such information must be factually reliable and relevant.'" (Red Br. 18 (citing *State v. Grindle*, 2008 ME 38, ¶ 18, 942 A.2d 673)); *but see e.g.* U.S. Const. amend. VIII. Obviously, this is wrong. Courts must obey a multitude of constitutional limitations at sentencing, including here, the Fifth and Sixth

Amendments. Courts cannot consider whatever "factually reliable and relevant" information they want and then offend any constitutional provision they wish, save the Due Process Clause.

The Blue Brief contains a lengthy discussion of the unconstitutional conditions doctrine. (Blue Br. 33-35). The Blue Brief also contains a lengthy discussion of the decisional law applying the unconstitutional conditions doctrine in the sentencing context. The State never addresses it, but such is the controlling law here.

II. The State fails to address the Confrontation Clause violation and has forfeited any response now.

The court clearly violated defendant's right to confrontation when it found as an aggravating factor that defendant "put [A.K.] in a position where she may have been forced to question her own reality." (A: 38; Blue Br. 38-39). The State ignored this argument resulting in forfeiture. *See Salisbury*, *supra* (discussing forfeiture). This is a gap in the analysis that this Court may not fill. *See United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (courts do not "sally forth" to do the parties' work for them). This aggravating factor alone provides sufficient cause to vacate the judgment and remand for resentencing. *See* Blue Br. 43-44 (even one of the court's sentencing errors is sufficient to vacate and remand).

III. *Grindle* does not help the State's perjury argument.

Grindle stands for the universally accepted proposition that a defendant's trial testimony may have relevance at sentencing. *See Grindle*, 2008 ME 38, at ¶ 17 (citing *LaChance v. Erickson*, 522 U.S. 262, 266 (1998)); *see also* Blue Br. 40-41 (discussing *United States v. Grayson*, 438 U.S. 41 (1978)). Conceptually, a defendant who perjures himself at trial may be subject to increased punishment.

This raises two questions, the first of which is whether a trial judge should engage in his or her own fact-finding about perjury or whether, because perjury is its own criminal offense, a judge should refer the matter to the prosecutorial authority and follow the normal channels in any criminal case. A plurality of courts has adopted the later approach. *See* Blue Br. 41-42.[9] This Court has not. *State v. Hemminger*, 2022 ME 32, ¶¶ 23-24, 276 A.3d 33.

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[9] Perjury is a crime. The latter approach recognizes that sentencing judges are not imbued with the power to ostensibly charge, find, and punish criminal activity without affording a criminal defendant *any* of the procedural safeguards attendant to a criminal trial. Direct and cross-examination at the underlying trial – about an entirely different crime or crimes – plainly fails to suffice.

The second question then becomes: as it relates to alleged perjury based on the defendant's trial testimony, how can a reviewing court ensure that the unconstitutional conditions doctrine is satisfied? *Grindle* suggests some answers. A defendant's decision to go to trial cannot be the sole criterion for aggravating a sentence. *Grindle*, 2008 ME 38, at ¶¶ 20-21 (discussing *State v. Farnham*, 479 A.2d 887 (Me. 1984)).[10] A court may increase punishment based on facts about the defendant or the crime which are revealed during the trial. *Id.* at ¶¶ 22-23 (discussing *State v. Winslow*, 2007 ME 124, 930 A.2d 1080). And a court may increase punishment if the defendant's testimony is scientifically disproven. *Id.* at ¶ 24 n. 5 (discussing *State v. Plante*, 417 A.2d 991 (Me. 1980)).

None of that helps the State here. In *Farnham*, the court's sentencing calculus was unclear; here, the court articulated the aggravating factors it found. (A: 38). In *Plante*, the defendant's testimony was proven false by blood alcohol evidence; here, no scientific evidence disproved defendant's testimony. And unlike in *Winslow*, the

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[10] Since *Grindle*, however, this Court has rightly clarified that remand is required if the sentencing court might have been influenced by the defendant's decision to go to trial, the presence of another criterion notwithstanding. *See e.g.* Blue Br. at 43-44 (collecting cases).

trial revealed nothing – perjury-wise – regarding the defendant personally or the nature of the offense. Defendant turns to that next.

IV. Legal sufficiency of the evidence is irrelevant to questions of perjury, lack of remorse, or lack of responsibility.

Legally sufficient evidence of guilt does not prove that a defendant's testimony must be false. (Red Br. 24). The entirety of the State's argument is a factual recitation of its case-in-chief.[11] (Red Br. 20-21, 24). How does *the state's* trial evidence establish *defendant's* feelings about remorse or responsibility? A guilty verdict does not prove perjury (or lack of remorse or responsibility), either. *See* Blue Br. 41-42 (collecting cases recognizing as much). There are important doctrinal distinctions between legal guilt and factual innocence. (Blue Br. at 35 (citing *Herrera v. Collins*, 506 U.S. 390 (1993) and *United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002)). The State ignores this.

No Maine case holds that whenever a defendant testifies, either legal sufficiency of evidence or a guilty verdict will support a judicial finding of perjury at sentencing. If that were true, then in every case

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[11] Obviously, defendant does *not* "agree there is reliable evidence that the defendant was dishonest on the stand when he created a false narrative about what had occurred." (Red Br. 24).

where a defendant is found guilty after testifying in his own defense, the defendant's sentence could be increased based on a finding of perjury (or lack of remorse or responsibility). That reasoning is inconsonant with the unconstitutional conditions doctrine.

V. The State's argument about lack of remorse or responsibility repeats the trial court's errors.

The State cites all of defendant's trial testimony as proof that he lacked remorse or responsibility. (Red Br. 20-21).[12] The sentencing court made the same mistake: it, too, failed to identify anything particular about defendant's trial testimony that was supposedly problematic, thereby creating the impression that defendant was allegedly lacking in remorse or responsibility because he dared to protest his innocence.[13]

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[12] The State omits mention that much of defendant's testimony was corroborated. *Compare* Red Br. 20-21 with the following: A.K. and her mother agreed that defendant and A.K. fought about a Black Lives Matter flag, and the George Floyd protests, and whether defendant was racist or had "white privilege." (1Tr. 135, 173-75; 2Tr. 34-36, 38-39). A.K.'s mother agreed that defendant and A.K. fought about A.K.'s biological father. (2Tr. 36-37).

[13] Citing *A.K.'s* testimony, the sentencing court said that defendant "threatened" and "blackmailed" A.K. if she disclosed "the situation," and that this was an aggravating circumstance. (A: 38). Defendant takes no issue with that; this is the sort of specificity the law requires. *A.K*'s testimony does not, however, also establish that *defendant* failed to show remorse or take responsibility.

The court said nothing at all about defendant's behavior. The unconstitutional conditions doctrine does not abide any of that.

The State adds that that the sentencing court was "able to view the defendant's demeanor and tone while testifying." (Red Br. 21). The mistake repeats itself here, too. The sentencing court never identified anything specific about defendant's demeanor or tone that it found offensive or evincing a lack of remorse or responsibility. Neither does the State. Where's the transcript citation that shows that defendant's *demeanor and tone* at trial was deserving of *additional prison time*?[14]

On that score, defendant implores careful circumspection. *See* Blue Br. 36 (other courts have wisely urged humility). Controlling for cultural, gender, and socioeconomic differences, what exactly is the proper demeanor for asserting one's innocence? Precisely what tone is appropriate when one is on trial for a highly stigmatizing offense that carries a lengthy prison sentence?

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[14] Trial judges have discretion at sentencing, but they must "state on the record the reasons" in support of their sentence, and the failure to do so is error. *See e.g. United States v. Betts*, 886 F.3d 198, 202 (2d Cir. 2018). The requirement that judges articulate their thinking ensures compliance with the law, including but not limited to, the Equal Protection Clause, and it facilitates appellate review.

Defendant never argues that the "*only* way a court can aggravate a sentence due to lack of remorse is when they [*sic*] allocute at sentencing." (Red Br. 22). But when a defendant fails to allocute at sentencing, and the sentencing court never identifies anything particular about either the defendant's trial testimony or his demeanor that evinces dishonesty or a lack of responsibility, a remand, where the court can either state its thinking with greater clarity or retreat from it altogether, is required.

The State's final salvo, that the sentencing court did not increase defendant's sentence based on his silence at sentencing, is betrayed by the record. (Red Br. 23). How is a defendant supposed to "take responsibility" at trial while simultaneously asserting his constitutional right to present a defense? How is a defendant supposed to "take responsibility" at sentencing while simultaneously asserting his right to pursue a direct appeal? The State does not say and neither does the sentencing court, which is an insurmountable problem for affirmance.

Third Assignment of Error

Defendant's conviction and sentence on Count 4 is legally infirm.

I. The babysitting incident could not be the factual basis for Count 4.

Count 4 alleged unlawful sexual contact. (A: 54). The babysitting incident could not support a verdict on Count 4 because at the second trial, A.K. testified that defendant put his hand underneath her shirt; however, A.K. never testified that defendant's hand touched any specific part of her body. (Blue Br. 53-54). A.K. also repudiated all her previous statements and testimony about the babysitting incident, which she acknowledged was incongruent with the testimony at her second trial and not "true," and she reiterated that the testimony at her second trial was what actually happened. (Blue Br. 17; 1Tr. 165-68). Justice Mitchell erred by failing to clearly tell the jurors that the babysitting incident could not be the basis for a conviction on Count 4. (Blue Br. 53-54).

II. Defendant's conviction on Count 4 is defective for want of jurisdiction.

The second, alternative, problem with defendant's conviction on Count 4 is jurisdictional in nature. The indictment alleged the date range of January 1, 2018 to December 30, 2018. (A: 54). The babysitting

incident happened in February 2019. (1Tr. 122; State's Exhibit 2). The prosecutor said, repeatedly, that the babysitting incident did not form the basis for Count 4. (Blue Br. 54; Red Br. 27-28). Because the grand jury's charge on Count 4 did not include the babysitting incident, the trial court lacked jurisdiction to enter a conviction on Count 4 *on those facts*. Again, Justice Mitchell erred by failing to clearly tell the jurors that the babysitting incident could not form the factual basis for a conviction on Count 4. (Blue Br. 54-55).

III. The State's arguments fail.

The State offers three responses. *First*, that defendant's complaint about the jury instruction is waived. (Red Br. 27). A party cannot waive a jurisdictional defect. (Blue Br. 50 (citing, *inter alia*, *State v. Liberty*, 2004 ME 88, ¶ 7, 853 A.2d 760)). Because the grand jury never returned a charge grounded on the babysitting incident, the babysitting incident could not form the factual basis for a criminal conviction. And because this Court has no assurance that the babysitting incident did not form the basis for the jury's verdict on Count 4 – and every reason to believe that it did – defendant's conviction on Count 4 cannot stand for jurisdictional reasons.

Second, the State mentions the jury's note asking whether "touching of breasts" counts as "unlawful sexual contact," but it never explains why that note matters to the analysis. (Red Br. 27-28). The court properly instructed the jury that "touching of breasts" did not constitute "unlawful sexual contact," and the State correctly says that the jurors are presumed to follow the court's instructions. (Red Br. 27). But none of that helps the State because A.K. testified that defendant never touched her breasts on the morning of the babysitting course. (1Tr. 167-68). What the jurors had in mind when asking that question is anyone's guess. Certainly, there is no assurance on this record, from that particular note, that the jurors rejected the babysitting incident as a basis for Count 4.

The babysitting incident evidence was seemingly admitted as other-acts evidence, but without a limiting instruction, the jurors clearly had no clue what use to make of it. (Blue Br. 54-55). The jurors were asking for help, but legally-sound advice never came. (Blue Br. 54-55).

The court used a general verdict form in this case. The jurors keyed-in on the morning of the babysitting course, but then received no limiting instruction from the Court or any other clear indication that

A.K.'s testimony regarding that incident could not form the factual basis for Count 4. Instead, the Court's instruction strongly suggested that it *could* form the basis for that charge, which was wrong for the two alternative reasons defendant identifies: the babysitting incident did not form the basis for the grand jury's charge, and the babysitting incident did not involve unlawful sexual contact. (Blue Br. 55).

Third, according to the State, *the prosecutor* "made it abundantly clear" that the babysitting course was not the factual basis for Count 4 – and for good reason. (Red Br. 26, 27-28). But arguments by the parties in summation cannot constrict the jury's decision-making; jurors are at liberty to disregard a party's summation altogether. Oftentimes, they do. There is no presumption in the law that the jurors follow the arguments of the parties. Jurors are presumed to follow *the court*, and here, *the court* told the jurors, in response to their question about the babysitting incident, that they were not required to confine the verdict to the proof that fell within the dates alleged in the indictment, ignoring the State's concession that the babysitting incident did not form the basis for the grand jury's charge, ignoring the jurisdictional defects, and ignoring the insufficiency-of-the-evidence. (Blue Br. 55).

Because there is nothing in this record from which this Court can confidently conclude that the jury's verdict on Count 4 rested on legally sufficient facts, as found by the grand jury, the conviction on Count 4 cannot stand.

Conclusion

For the reasons herein and in the Appellant's Brief, defendant prays for the relief outlined with each assignment of error.

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Certificate of Service

This brief was served on opposing counsel as required by Rule 1E of the Maine Rules of Appellate Procedure.

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Certificate of Word Count

This reply brief complies with the type-volume limitation of M.R.App.P. 7A(f)(1) because it contains 4,082 words, excluding the parts of the brief exempted by M.R.App.P.7A(f)(3).

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Dated: October 7, 2025

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